

SPECIAL CIVIL APPLICATIONS No 933 & 934 of 1988

Hon'ble MR.JUSTICE N.N.MATHUR

2. To be referred to the Reporter or not? 2-5 No

JJJ

5. Whether it is to be circulated to the Civil Judge?

Pravinchandra P Khatiwala & Nirmalaben Khatiwala
vs
State of Gujarat & Ors.

Mr YN Oza with Mr Kavina, Advocates for Petitioner
Mr Kamal Trivedi with Ms.Harsha Devani, AGP for
the State

Date of decision: 22/03/96

The challenge in these Special Civil Applications are demand notices issued by the Executive Engineer and a Recovery notice issued by respondent No.3-Mamlatdar, Choryasi, Surat.

2. The petitioner in SCA No.933/88 - M/s. Associated Engineering Corporation is engaged in supply of engineering goods. The petitioner in SCA No.934/88 M/s. Seema Enterprises is also engaged in supply of engineering goods. In response to the tender notice invited by respondent No.4-Executive Engineer, Irrigation Project, Division II, Bodeli and respondent No.4 Executive Engineer, Irrigation Project, Division No.III, Vadodara for supply of E.R.W. pipes of Diameter and specification mentioned in the advertisement, the petitioners submitted their tenders. Prices quoted by them was found to be the lowest and as such their tenders were accepted. An agreement was entered into by the Executive Engineer on behalf of the Government of Gujarat and the petitioners for supply of E.R.W. pipes at the rates quoted in the agreement being Agreement Nos. G-40 of 1981-82, D-60 of 1981-82, D-68 of 1981-82, D-69 of 1981-82 and D-4 of 1982-83. The petitioners supplied the said pipes and the final payment was made. The security deposit was also returned to the petitioners in the year 1992. Thus, the agreement came to be concluded with the payment of the amount and refund of the security deposit. However, to the petitioners' surprise, after a lapse of 3 to 4 years, the petitioners received a notice stating, inter-alia, that the petitioners have violated the contract clause No.23/25 and therefore, the Government had suffered a loss of amount mentioned therein. The petitioners were asked to pay the said amount to the Department. It was also stated that the basis of the notices was the rates of such pipes which were supplied by the petitioner which were higher than the prices of the Steel Authority of India. On that basis in Special Civil Application No.933/88, the respondents calculated that a sum of Rs.252.50 per metre was in excess and as such, the petitioners were liable to pay Rs. 55,18,426.89. In Special Civil Application No.934/88, calculated a sum of Rs.215/- per metre in excess, and raised demand for Rs.30,10,163.23.

3. By way of these petitions, the petitioners seeks direction to quash and set aside the demand notice of the Executive Engineer dated 25.12.1985 - Annexures B-1 to B-4 and notices dated 21.12.1985, 6.2.1986, 18.11.1985 - Annexures B-5 to B-7 and Recovery Notice issued by respondent No.3 dated 29.4.1987 at Annexure 'C'.

4. The say of the petitioners is that the respondents have pursued the matter of recovery on the hypothesis that the prices quoted by the petitioners were higher than the prices of Steel Authority of India (for

short, 'SAIL'). It is submitted that nowhere in the tender notice nor in the agreement, there was mention about the value of the pipes to be supplied by the petitioners were required to be the same or less than the prices of SAIL. It is further submitted that the Executive Engineer acceded to the jurisdiction in comparing the prices quoted by the petitioners with the prices of SAIL. It is also submitted that the subject contract is concluded, and as such it cannot be re-opened. It is also submitted that the pipelines of SAIL are not available in the free market and the prices offered by the petitioner is dependent upon several factors such as quick supply, supply of bulk, availability of pipes and transportation expenditure and other related factors and the petitioners quoted as per the minimum cost of the pipes plus service charges. Therefore, the question of comparison of prices quoted by the petitioners with the prices of SAIL is totally misplaced. It is further submitted that in any case, whatever enquiry was required to be made, the same should have been undertaken before the acceptance of the tender or at least before the material was supplied. The petitioners further submitted that at a subsequent stage, they submitted an offer that the pipes should be returned to them and that they are prepared to return the price. It is also submitted that if in the view of the respondents, there is excess payment on account of any collusion or fraud, that is essentially a question of fact and for that the remedy if at all available is by way of suit for recovery. It is also stated that as they were threatened by the respondents to recover of the amount under the provisions of Bombay Land Revenue Code, they filed a suit before the Civil Judge (SD), Narol but subsequently the same was withdrawn as the petitioners were asked to pay a full advalorem court fee on the amount shown in the recovery notice.

5. Mr P H Shah, Executive Engineer, Irrigation Project, Division II, Bodeli has filed an affidavit-in-reply stating that the petitioners had offerered supply of the goods as per the tenders. The tenders were duly signed by the petitioners before executing the contract. As per condition No.23 of the tender clause, the petitioners are not entitled to charge or quote any price higher than the price as prevailing for the same goods levied by the SAIL. It is further stated that in case it has been found that the bidder had quoted more price and he had received excess amount, in such eventuality, the said amount is required to be refunded by the bidder, failing which it is liable to be

recovered. The further say of the respondent is that the petitioner had quoted higher price than that of the SAIL prevailing at the relevant point of time, and therefore, the amount paid over to them being excess amount is to be recovered as State of Gujarat had incurred heavy loss in the purchase of steel from the petitioners. A further affidavit has been filed by Mr Pravinbhai A Patel, Executive Engineer, I.P. Division 11, Bodeli reiterating what has been stated by Mr P H Shah in his affidavit. It is further stated that the Government had fixed the rates of E.R.W. pipes on the basis of rates fixed by SAIL. A statement giving full information regarding petitioners' (suppliers) rates, Government rates, difference between the aforesaid two rates and the amount to be recovered has been annexed to the reply. It appears from the chart that different items were purchased from the petitioners @ Rs.448/Rmt. whereas the market rate as per the SAIL was Rs.195.50 and as such the excess amount was paid to the petitioner. It is further stated that the officials concerned, before accepting the tender, had not enquired with regard to the market rate and as a result of negligence on the part of the official concerned, tenders quoting such high rates were accepted. The tenders were accepted in the years 1981-82 and 1982-83. This was detected in the year 1984 by the Department, and therefore, the appropriate proceedings were initiated against the defaulting employees and the petitioner contractors.

6. In para 14 of the affidavit, it is alleged that the petitioners were in fact hand in glove with the concerned officer who accepted the tender at such high rates with a view to cheat the Government of a large sum of money. It is further stated that by virtue of clause 20 B, any amount due to the Government is liable to be recovered as arrears of land revenue and hence proper course has been adopted by requesting the Collector to recover the same under the provisions of the Bombay Land Revenue Code.

7. The petitioners have filed a rejoinder stating that in the year 1986, a notice under Section 80 of the Code of Civil Procedures was served upon the respondent through their Counsel, inter-alia, asking the respondent to return the pipes supplied by the petitioners and take back the purchase price, if it was thought any loss has been caused or incurred by the respondents. By communication dated 2.1.1987, the respondent declined the said offer. The petitioners have also produced communications between the Deputy Engineer, IP Sub-Division 19 and the Branch Manager of SAIL dated

25.3.1981 to show that at the relevant time ERW pipes of 12 1/4 outside Diameter were not available with SAIL, as such there was no question of any rate provided by them.

8. I have heard Mr Kavina, learned Advocate appearing for the petitioners in both the matters. It is contended by Mr Kavina that the demand notice was issued by the Executive Engineer and the consequent demand notice issued by the Collector for coercive recovery is illegal and void for the reason that after the contract is concluded, the respondents have no authority to raise the demand which is more in the nature of recovery for damages. He further submits that the condition clauses 20-A, 23 and 25 cannot be pressed into service as the impugned demand is not the money due and payable. He submits that the money can be due and payable only after the same is determined by a proper procedure. Simply a demand for claiming the damages cannot be construed as money due and payable. On the other hand, Mr Kamal Mehta, learned AGP submits that in view of condition No.23, the petitioners could not have quoted above the controlled price fixed by the Government and the respondents are entitled to recover the excess charges received by the petitioners as per the terms and conditions of the contract. He further submits that the matter involves disputed questions of facts and therefore, the only remedy available to the petitioners is to file Civil Suit. He further submits that in fact Civil Suit was filed by the petitioners in the Court of Joint Civil Judge, Narol, but the same was withdrawn subsequently for the reason that the petitioners could not submit the proper court fees. He thus submits that it is not only that there is alternative remedy available by way of Civil Suit, but in fact the petitioners have availed the same and the suit was rejected under the provisions of Order 7 Rule 11 (C) of the Code of Civil Procedures.

9. In order to appreciate the controversy, it would be convenient to extract some of the relevant conditions of the tender:

"Clause 20A: Any sum of money due and payable to the contractor (including the security deposit returnable to the contractor) under this contract shall be appropriated by the Government and shall be set-off against any claim of or under any other contract made by the contractor with the Government."

"Clause 20B: "When no such amount (referred to a clause No.20 of the contract agreement) for the purpose of the recovery from the contractor against any claim of the Government is available such a recovery shall be made from the contractor as arrears of land revenue."

Clause 23: "The price quoted by the contractor shall not in any case exceed the contractor price if any fixed by Government or reasonable price which is permissible for him to charge private purchase for the same class and description of goods under the provision of boarding or profiteering prevention ordinance 1953 as amended from time to time. If the price quoted exceeds the controlled price or the price permissible under boarding and profiteering prevention (Ordinance) the purchase at his description will in such case exercise the right of the revising the private at stage so as to confirm with the controlled price of the permissible under the boarding and profiteering prevention ordinance. The discretion will be exercised without prejudice or any other action that may be taken against the contractor." (reproduced as it is)

10. At the outset it may be stated that it is not in dispute that before issuance of the impugned notice raising the demand, the contract come to be concluded, inasmuch as the supply of E.R.W. pipes were made by the respondents and final payment of the supply including the security deposit was made in the year 1982 itself. The notices were given during the period 20.4.1985 to 18.4.1987. Thus, apparently, the notices were given after lapse of 3 years. It is also not in dispute that during this period, the pipes supplied were fully utilised. Reverting to clause 23, the clause on the basis of which the respondent has issued recovery notice only provides that the price quoted by the contractor shall not exceed than price, if any, fixed by the Government or reasonable price which is permissible. It is not the case of the respondent that the Government had fixed the contract price and the petitioners had quoted a price exceeding that contract price. The case of the respondent is that the price quoted by the Contractor is much more than the price fixed by SAIL. There is no reference to the price fixed by the SAIL under clause 23. Even if it is assumed that the price fixed by SAIL should be considered as reasonable price, even then no material worth-the-name has been placed on record to show what was

the price fixed by the SAIL at the relevant time. Of course, the price of the pipes by SAIL has been indicated in the schedule appended with the reply but inspite of repeated opportunities given, no document has been produced to show as to how the said figure was obtained by the respondent. No document has been placed on record which may reflect the market rate of the SAIL as Rs.195.50 at the relevant time. In absence of any document, there is nothing to show how the said figure has been arrived at by the respondent. In view of this fact I have no hesitation in arriving at the conclusion that the show cause notice has been issued without any basis with respect to the market price as per SAIL at the relevant time. The only repeated contention of the respondent is that there was a collusion between the petitioners and the Executive Engineer and for that the Executive Engineer has been put under suspension. If that is so, the respondent may have a claim by way of Civil Suit for recovery of the amount paid by mistake or as a result of fraud. In any case, this will entirely be a question of fact. But such a decision cannot be unilaterally taken by the respondents themselves. It is contended by Mr Mehta that as the petitioners have remedy they may be relegated to remedy of suit. The contention is wholly misconceived. If it is the case of the respondents that money was paid under mistake or as a result of fraud then, it is for the party claiming recovery to file suit for the recovery of the amount. In that case, such burden will be on such party claiming recovery to establish mistake or fraud. It is of course true that in the present case, suit was filed by the petitioners and they were rejected for the reason that the petitioner could not remove the deficiency by submitting court fees. But this cannot come in way of the petitioner to claim relief under Article 226 of the Constitution of India.

11. It is contended by Mr Mehta that the respondents are entitled to recover the amount in view of the clause 20 B of the Contract. Clause 20A provides that any sum of money due and payable to the contractor shall be appropriated by the Government and shall be set off any claim or under any other contract made by the contractor with the Government. At the first instance, the respondent has not invoked provisions under 20 A in the present case as they have not claimed any set off the claim under any other contract of the petitioners. In any case, the said clauses 20A and B cannot be invoked as the said provisions are attracted where the claim has been ascertained under the appropriate provisions of law

and the same has become due. The Supreme Court in the case of Union of India vs. Raman Iron Foundry. reported in AIR 1974 SC 1265 has observed that " a claim that damages for breach of contract is not a claim for a sum presently due and payable and the purchaser is not entitled. in exercise of the right conferred upon it under clause 18, to recover the amount claimed by appropriating other sums due to the contractor."

12. In view of the aforesaid discussion, the impugned notices are held to be ex-facie illegal and without authority of law and they are deserved to be quashed. In the result, I allow both the aforesaid Special Civil Applications and quash the impugntned notices. The amount if any paid under the impugned notices shall be refunded to the petitioners.

Rule made absolute accordingly.

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